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No. 71-1095

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE CONTINENTAL INSURANCE COMPANY, PETITIONER

v.

GEORGE A. BYRNE, DEPUTY COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Claimant Frank Grayson, a longshoreman, sought compensation under the Longshoremen's and Harbor Workers' Act for injuries he received when he fell 24½ feet through an open hatch aboard the *Kostantis Yemelos,* the vessel on which he was working. Based on the evidence presented at the hearing on the claim, the respondent deputy commissioner found that the injury arose out of and in the course of claimant's employment and awarded him compensation (Pet. App. A, 1a-3a).

At the hearing, claimant testified that he was one of an eight-man crew unloading "'tween decks" in the No. 2 hold. He had to relieve himself, told other

members of the crew that he had to go to the washroom and climbed the ladder to the deck. From this point, until he was found in the bottom of the No. 1 hold, he could remember nothing (Pet. App. B, 6a–7a, 9a).

The only washroom facilities of which the men were aware were on the dock, 150 to 200 yards away from the worksite (Pet. App. C, 18a). While there were emergency facilities aboard the ship, the men were not told of them (Pet. App. C, 19a). There was no evidence that anyone had relieved himself in the area from which claimant fell, but there was substantial rubble there.

The cargo in the No. 1 hold had been "torn open, fully exposed, and *possibly* pilfered" (Pet. App. C, 18a). Before the vessel docked in Chicago, where the injury occurred, that cargo had been worked on in another port; no cargo was found on claimant when he was brought out of the hold (Pet. App. C, 18a).

Based on this evidence, respondent awarded the claimant compensation, finding that (Pet. App. A, 2a):

> The injury arose out of and in the course of employment. The employee had left his worksite aboard the vessel to look for a washroom when the injury occurred.

Petitioner thereupon filed suit in the district court to set aside the award. On cross motions for summary judgment, the district court held that the finding that the injury arose out of and in the course of employment was not supported by substantial evidence and vacated the award.

The court of appeals reversed and remanded, ruling that respondent's finding that the injury arose out of and in the course of employment "was neither 'irrational' nor 'unsupported by substantial evidence on the record * * * as a whole'," according to the standard set forth in *O'Keeffe* v. *Smith, Hinchman & Grylls Assoc.*, 380 U.S. 359, 362. The court stated (Pet. App. C, 20a–21a):

> We are convinced that, at best, the employer's evidence was insufficient to preclude the Deputy Commissioner's determination that the injury was compensable. The only defense attempted by the employer was the introduction of evidence obviously intended to produce the inference that Grayson had deviated from the course of his employment and suffered injury while pilfering cargo. The evidence in that regard was so weak that, in fact, there was no evidence that pilfering had occurred in the port of Chicago. In any event, the Deputy Commissioner determined, "The injury arose out of and in the course of employment. The employee had left his worksite aboard the vessel to look for a washroom when the injury occurred." That conclusion was obviously based upon Grayson's testimony that he left his worksite to answer an urgent call of nature and on a determination that the employer's evidence did not warrant a finding that Grayson had deviated from his employment.

2. The decision of the court of appeals was correct and presents no issue warranting review by this Court. The decision is factual and involves only the application of settled principles to the particular case.

Contrary to petitioner's contention (Pet. 6–7), the court of appeals did not treat the presumption of coverage in 33 U.S.C. 920(a) as independent affirmative evidence. Its statement that "the employer's evidence did not warrant a finding that Grayson had deviated from his employment" merely emphasized that the employer's evidence was "so weak" that it did not constitute "substantial evidence" necessary to rebut the presumption.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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